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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 419

HOWARD JOHNSON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-17) is not yet reported. The Decision and Order of the National Labor Relations Board (J.A. 2a-30a)[1] are reported at 135 NLRB 1260.

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[1] "J.A." references are to the Joint Appendix in the court below.

JURISDICTION

The decree of the court of appeals was entered on June 4, 1963 (Pet. 22). The petition for a writ of certiorari was filed on August 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner, in operating a restaurant on the New Jersey Turnpike, is an "employer" within the meaning of Section 2(2) of the National Labor Relations Act, and not exempt as an instrumentality of the State of New Jersey.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136; 29 U.S.C. 151 *et seq.*) are set forth at page 2 of the petition.

STATEMENT

On April 11, 1961, following a consent election, the Board certified the Union[1] as the collective bargaining representative of employees at the Howard Johnson restaurant on the New Jersey Turnpike near Milltown, New Jersey (J.A. 13a-14a, 84a-85a). Petitioner refused to bargain with the Union on the

[1] Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

ground, *inter alia*, that, in operating the restaurant, it was an agent of the State of New Jersey and was thus not an "employer" within the meaning of Section 2(2) of the Act. These are the pertinent facts.

The Howard Johnson restaurants on the New Jersey Turnpike are operated in facilities owned by the New Jersey Turnpike Authority, an instrumentality of the State of New Jersey (Pet. 5-8, 18-21; J.A. 104a-125a, 127a-130a). Under the operating agreement, the Authority provides the buildings and all permanent equipment, while petitioner provides all other equipment and furnishings necessary for the operation of the restaurants (J.A. 108a-109a). The agreement requires petitioner to operate the restaurants 24 hours a day, in an "attractive, clean, safe and sanitary manner," serving meals "reasonably suited to the traveling public at large," at prices "comparable" to those charged in the general vicinity of the Turnpike (J.A. 114a-115a). The agreement further requires petitioner to "comply with all applicable governmental laws and regulations respecting the safety, health, sanitary codes and employment, and all other statutory provisions that may be applicable" (J.A. 119a). However, restaurant employees are hired, fired and paid by petitioner, and are under its direction, control and supervision (J.A. 24a, 34a-37a, 39a-40a, 70a-71a, 87a, 126a).

Based on these facts, the Board concluded that petitioner retained sufficient control over employment conditions at the Turnpike restaurant to make it an "employer" within the meaning of the Act (J.A.

24a). Accordingly it ordered petitioner to bargain with the Union (J.A. 2a-3a).

The court of appeals sustained the Board's holding and enforced its order (Pet. 13-17).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

Section 2(2) of the Act excludes from the category of employers subject to the Act "any State or political subdivision thereof." [3] The sole question presented is whether petitioner, in operating the Milltown restaurant on the New Jersey Turnpike, acts as a private employer or as an agent of the Turnpike Authority, an instrumentality of the State of New Jersey. In *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398, this Court pointed out that the decisive inquiry is whether the private party retains control over "wages, hours, and other terms and conditions of employment," or whether he has transferred to the government "all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act" (pp. 405-406). In the former case, the employees are entitled to the protection of the Act, while in the latter case they may lose it.

Petitioner does not contest the validity of the prin-

[3] Section 2(3) in turn excludes from the definition of "employee" any individual employed by any "person who is not an employer as herein defined."

ciple stated in *Atkins*, but merely complains about its application to the facts of this particular case. This Court does not normally review such factual issues. In any event, the record fully supports the Board's conclusion that in the operation of the Turnpike restaurant petitioner was acting as an employer under the Act.

Petitioner accepts (Pet. 5) the Board's finding, approved by the court below (J.A. 24a; Pet. 14), that the restaurant employees are "hired and fired and paid by the [petitioner] . . . and under its direction, control and supervision . . . ." This finding, without more, justifies the conclusion of the court of appeals that petitioner "operates its restaurant as an independent contractor of the Authority, and has retained such control over the elements of the employment relationship that it is an 'employer' within the meaning of the Act" (Pet. 15). A contrary conclusion is not required by the fact that Section 22(d) of the operating agreement with the Authority (J.A. 121a) permits the latter to operate the restaurant for its own account in the event the private operator "is unable because of a strike or other labor difficulties" to carry on proper operations. As the court below observed (Pet. 16), this clause "constitutes a recognition that the workers are employees of [petitioner] and not state employees. If the parties considered them to be state employees, the clause would be meaningless in its context, for under New Jersey law such employees do not possess the right to strike." Nor is state control over the employment relation established by the provisions of the operat-

ing agreement which require petitioner to operate 24 hours of each day, and to serve food of good quality at reasonable prices. As the court below said (Pet. 17), "they appear to be nothing more than standard conditions which one in the position of the Authority would include in an agreement with an independent contractor for the efficient, orderly operation of a turnpike restaurant." This degree of governmental control is far more tenuous than that in other cases where a private employer-employee relation has been sustained. See *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398; *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1963.